No. 84168-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION III

LARRY MICHAELS, and DEBBIE MICHAELS, husband and wife and the marital community comprised thereof;

DAN P. EVANS, a single person; and

KATHY D. CMOS, individually, and as Administratrix and Representative of the Estate of Mike P. Cmos, Jr.;

Respondents,

v.

CH2M HILL, INC., a Florida corporation and KELLY IRVING,

Appellants.

RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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INTRODUCTION

Amicus Washington State Association For Justice Foundation (WSAJF) begins with the assertion that a "principal issue on appeal" is the interpretation of RCW 51.24.035. WSAJF AB 2. But this is not an issue here. The statute is plain and unambiguous, immunizing design professionals from suit unless they contractually undertake responsibility for worksite safety or actually exercise control over the worksite. RCW 51.24.035(1). There is also a narrow exception when a design professional negligently prepares design plans that does not apply here. RCW 51.24.035(2).

It is undisputed that CH2M and Kelly Irving did not contractually or actually control the worksite, so the immunity statute applies. The real issue in this appeal is whether the negligent design plan exception includes an alleged failure to provide a written "downstream" analysis for a rejected suggestion of an interim fix that did not cause the accident. The answer is no, but WSAJF has little to say about that.

This Court should reverse and dismiss because CH2M is statutorily immune.

RESPONSE TO STATEMENT OF THE CASE

WSAJF states that the plaintiffs' negligence claim was based on CH2M's failure to supply a "written analysis" as to how its suggested interim modification to the recirculation and heating system would alter the system's operation. WSAJF AB 3. This characterization omits that the City rejected CH2M's recommendation and modified the system without CH2M's help. WSAJF simply misapprehends the facts.

The City asked CH2M to attend a brainstorming session about an interim fix for a discrete digester heating problem. BA 29-32. CH2M's Kelly Irving recommended a valve, but the City rejected his suggestion, instead choosing a "skillet" to save money. BA 32-33, 46. The City fabricated and installed the skillet without CH2M's help. *Id.* In fact, City employee John King specifically told CH2M that he did not need any help because he knew the system he helped to design and had been operating for over two decades. BA 46; RP 518, 530, 535, 567, 1627, 1735-36. It is simply illogical to conclude that CH2M a would have to give the City a "written analysis" for a suggestion that the City rejected.

The failure to provide written analysis of downstream effects plainly did not cause the dome to collapse. BA 61-65. Neither the

rejected interim fix, nor the skillets actually used, had anything to do with the accident. The City needed an interim fix because the sludge had become too thick for the digesters to handle properly. BA 30. Separating the flows as Irving suggested fixed this problem. *Id.* The accident had nothing to do with the separation of flows, but was caused by City negligence at every level, including among other things, setting a three-way valve the wrong way, intentionally disabling digester overflow-prevention devices, ignoring clear indications that the overflow-warning devices were dangerously underreporting, ignoring alarms, and failing to stop the flow of raw sludge into the digester. BA 6-21, 60-75; Reply 3, 37-45. Nothing CH2M and Irving might have written down about their suggested interim fix (a downstream analysis the City specifically rejected) would have prevented the City's negligence from causing this accident. *Id.*

REPLY ARGUMENT

A. RCW 51.24.035(1) creates a broad immunity that is wholly consistent with the broad immunity given to employers under the IIA.

Although WSAJF's entire argument is based on "interpreting" RCW 51.24.035 – the immunity statute –never addresses the statute's plain language as a whole. *But see* ***City of Spokane v. Rothwell***, 166 Wn.2d 872, 877, 215 P.3d 162 (2009) (statutes interpreted as a whole). RCW 51.24.030(1) reserves to injured workers the right to seek recovery from negligent third parties. RCW 51.24.035(1) immunizes design professionals from the suits allowed by § .030, unless the design professional contractually assumes responsibility for safety practices or actually exercises control over the relevant portion of the premises:

> Notwithstanding RCW 51.24.030(1), the injured worker or beneficiary may not seek damages against a design professional who is a third person and who has been retained to perform professional services on a construction project, or any employee of a design professional who is assisting or representing the design professional in the performance of professional services on the site of the construction project, unless responsibility for safety practices is specifically assumed by contract, the provisions of which were mutually negotiated, or the design professional actually exercised control over the portion of the premises where the worker was injured.

RCW 51.24.035(1). Subsection 2 creates an exception to this design-professional immunity, for negligent preparation of design plans (RCW 51.24.035 (2), emphasis added):

> **The immunity provided by this section** does not apply to the negligent preparation of design plans and specifications.

Thus, the statute plainly creates an immunity for design professionals, with an exception to that immunity for the negligent preparation of design plans and specifications. The statute is unambiguous and needs no "interpretation."

B. WSAJF's incorrect analysis affronts many statutory contruction maxims.

Despite agreeing that the Court interprets only ambiguous statutes, WSAJF never asserts that the statute is ambiguous. WSAJF AB 9; ***Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm'n***, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). The statute is clear and unambiguous – it plainly immunizes design professionals unless they contractually assume responsibility for worksite safety or actually control the worksite. RCW 51.24.035(1). The statute creates one exception – negligent design-plan preparation. RCW 51.24.035(2).

WSAJF turns this straightforward statute on its head, ignoring the statute's plain language, and improperly reading terms

into the statute. ***Rothwell***, 166 Wn.2d at 876-77. WSAJF argues that § .035(1) immunizes design professionals only from "certain negligent supervision claims . . . unless the design professional, by negotiated agreement or conduct, voluntarily accepts 'responsibility for safety practices.'" WSAJF AB 9, 5. But the statute never mentions "negligent supervision," a term WSAJF uses not less than 20 times. The Legislature easily could have limited the statute as WSAJF claims, but it plainly did not do so.

WSAJF's negligent supervision argument is belied by its own acknowledgement that under the common law, design professional liability was "rooted in contract-based obligations and/or conduct reflecting the exercise of control over worksite safety." WSAJF AB 10. This was precisely CH2M's point in arguing that RCW 51.24.035 codifies case law holding that a worker may not sue a design professional who assumed neither contractual duties nor actual worksite control. *See* BA 55-58 (discussing ***Riggins v. Bechtel Power Corp.***, 44 Wn. App. 244, 722 P.2d 819, *rev. denied*, 107 Wn.2d 1003 (1986); ***Porter v. Stevens, Thompson & Runyan, Inc.***, 24 Wn. App. 624, 602 P.2d 1192 (1979), *rev. denied*, 93 Wn.2d 1010 (1980); and ***Loyland v. Stone & Webster Eng'g Corp.***, 9 Wn. App. 682, 687, 514 P.2d 184 (1973), *rev. denied*, 83

Wn.2d 1007 (1974)). Both the statute and the common law unequivocally provide that design professionals are immune from suit unless they contractually assume responsibility for safety or actually control the worksite. CH2M never assumed responsibility by contract or conduct. BA 25-37; Reply 5-6.

WSAJF also ignores the plain meaning of § .035(2), the exception for negligent design-plan preparation. Although WSAJF agrees, as it must, that under § .035(2) tort claims for negligent design preparation "fall outside of" the immunity, WSAJF insists that § .035(2) is not an "exception," but a "declaration" confirming the statute's limited immunity for negligent supervision claims. WSAJF AB 5-6. Like § .035(1), § .035(2) says nothing about negligent supervision, so it does not "confirm[]" anything in that regard. WSAJF AB 6. And WSAJF later concedes that the plaintiffs (and everyone else) referred to § .035(2) as an "exception." WSAJF AB 15 n.2; *infra* Argument § C.

There is no support for WSAJF's claim that the design professional immunity is a "limited immunity" that must be "narrowly construed." WSAJF AB 2, 6, 7, 8, 9, 11, 17. Consistent with the immunity the IIA provides to employers, the design professional immunity broadly reaches design professionals "retained to perform

professional services on a construction project." BA 41 (quoting RCW 51.24.035(1)). The immunity must be this broad to have any purpose, where design professionals often work off-site, over many years, and before construction commences. Reply 14.

The immunity is not an "exception," despite WSAJF's claims to the contrary. WSAJF AB 8. Rather, the third-party action itself is an exception to the general workers' compensation scheme, under which workers gave up their right to sue in return for sure and speedy compensation. RCW 51.04.010. The immunity statute merely gives design professionals parity with the City, protecting them from exactly what happened here – liability for the City's negligence simply because they are the only available deep pocket.

Finally, the cases upon which WSAJF relies are inapposite. WSAJF AB 8 (citing ***Miller v. City of Tacoma***, 138 Wn.2d 318, 324, 326-27, 979 P.2d 429 (1999), ***Lutheran Day Care v. Snohomish County***, 119 Wn.2d 91, 829 P.2d 746 (1992)). This matter involves a statutory immunity, codifying the common law – it is irrelevant that our courts may "disfavor" common law immunities. WSAJF AB 8-9 (citing ***Lutheran Day Care***, 119 Wn.2d at 105).

Miller too does nothing to further WSAJF's argument. ***Miller*** involved the Open Public Meetings Act (RCW 42.30), which

provides that all government meetings must be open to the public, unless one of the act's exceptions applies. 138 Wn.2d at 324-25. In the context of construing one such exception, this Court noted that the exceptions must be "narrowly confined" where the act mandated a liberal construction. *Id.* (citing RCW 42.30.910). As discussed above, third-party actions are the exception – the design professional immunity is consistent with the general workers' compensation scheme. If any of RCW Chapter 51.24 should be narrowly construed, it is § .030 (third-party suits), not § .035 (design professional immunity).

In sum, WSAJF turns this straightforward statute on its head. The statute's plain meaning mandates that CH2M and Irving are immune. This Court should reverse.

C. This Court should not consider WSAJF's proffered statutory interpretation, which has never been raised before.

As mentioned above, the statute's plain language contradicts WSAJF's attempt to limit the design professional immunity to negligent supervision cases. This may explain why no party has ever previously made this argument.

The parties' pleadings continually referred to § .035(2) as an "exception" throughout the entire case. CP 1603-04, 1607, 2971-

72, 2975, 3988. So too did the trial court. CP 4115. WSAJF's misreading has never been raised before. This Court will not consider arguments solely raised by amici. ***State v. Clark***, 156 Wn.2d 880, 894, 134 P.3d 188 (2006).

D. CH2M never prepared a design plan for the rejected interim fix, but does not argue, as WSAJF claims, that the immunity exception applies only to written design plans.

WSAJF argues that "negligent design claims simply are not immunized." WSAJF AB 14-16. CH2M does not argue otherwise, but rather has consistently acknowledged that the statute creates an exception to the design professional immunity for the negligent preparation of design plans. BA 45; Reply 6, 12. This is the only reasonable reading of the statute's plain language. RCW 51.24.035(1).

But WSAJF asks this Court not to reach CH2M's argument on this point, claiming that CH2M argues that § .035(2) creates an exception to the design professional immunity only for written design plans. WSAJF AB 15-17 (citing Reply at 8, 12-13). CH2M never argued that written plans were required under § .035(2) – the Reply at page 8 has nothing to do with this point, and the Reply at page 13 argues that even if design plans had been prepared, the

injuries were unrelated to the interim fix. *Compare* WSAJF AB 17 *with* Reply 7, 13.

CH2M's actual argument has always been that it never prepared design plans for the rejected interim fix. BA 45-48; Reply 6, 12. After rejecting CH2M's suggested interim fix, the City designed, fabricated, and installed the skillets without design-professional assistance. *Id.* At the City's request, CH2M did not prepare any design plans or specifications for the separation of flows. Reply 6, 12. In fact, the City specifically rejected Mr. Irving's offer of design assistance. *Id.*

In the final analysis, the so-called "downstream analysis" would have been operational advice, not a design plan or specification:

> . . . the City did not ask for or receive any design plans or specifications regarding the interim fix. At most, an analysis of the downstream effects on valving operations would have been operational advice, not the "preparation of design plans and specifications."

Reply 12. The separation of flows suggestion was sound engineering that successfully "cured" the digesters' "sickness." But even if the failure to provide unwanted operational advice were negligent, that is not the negligent preparation of design plans or

specifications, so CH2M Hill is still immune. The design professional immunity applies, but the exception does not.

WSAJF's straw man argument fails to address the real issue on appeal – whether the immunity exception for the negligent preparation of design plans and specifications (§. 035(2)) includes the failure to provide an unwanted written analysis for a rejected suggestion of an interim fix having nothing to do with the accident. The absence of a written operational analysis of the interim fix did not cause the dome to collapse. BA 61-65. Nor did Irving's rejected suggestion, or the skillets themselves, injure anyone. Reply 6, 12. This Court should reverse and dismiss because CH2M Hill and Irving are immune from liability

CONCLUSION

This Court should reject WSAJF's convoluted "interpretation" and give effect to the statute's plain language, under which Irving and CH2M are immune. The Court should reverse.

RESPECTFULLY SUBMITTED this 11th day of October 2010.

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL AND/OR U.S.MAIL

I certify that I caused to be electronically mailed and/or mailed by U.S. Mail, postage prepaid, a copy of the foregoing **RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION** on the 11th day of October, 2010, to the following counsel of record at the following addresses:

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